No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER CO.,

Petitioner,

v.

U.S. FISH & WILDLIFE SERVICE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF FEDERAL RESPONDENTS

RICHARD L. REVESZ*
JASON A. SCHWARTZ
INSTITUTE FOR POLICY INTEGRITY
NEW YORK UNIVERSITY SCHOOL OF LAW
139 MacDougal St., 3rd Floor
New York, NY 10012
Tel: (212) 998-6185
richard.revesz@nyu.edu
**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Amicus curiae addresses an issue that Petitioner and its supporters raise in relation to the second question presented. The second question is:

Whether an agency decision not to exclude an area from critical habitat designation because of the economic impact of designation is subject to judicial review.

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INTEREST OF THE AMICUS CURIAE[1]

The Institute for Policy Integrity at New York University School of Law[2] ("Policy Integrity") is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in administrative law, economics, and public policy. Policy Integrity is a collaborative effort of faculty; a full-time staff of attorneys, economists, and policy experts; and law students.

An area of special concern for Policy Integrity is the promulgation of rational environmental regulations justified by balanced cost-benefit analysis. Policy Integrity has specific expertise in the proper scope and estimation of costs and benefits, as well as in the application of economic analysis to regulatory decisionmaking. Our director, Richard Revesz, has published extensively on the need for federal agencies to thoroughly assess both ancillary benefits and unquantified benefits. *See, e.g.*, Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 Cal. L. Rev. 1423 (2014); Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. Chi. L. Rev. 1763 (2002). Policy Integrity has

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[1] The parties have submitted letters to the Clerk granting blanket consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] No part of this brief purports to present New York University School of Law's views, if any.

previously submitted amicus briefs to this Court on ancillary benefits and unquantified benefits. *See* Policy Integrity *Amicus* Br., *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46).

Petitioner and their amici invite the Court to use the second question presented in this case as an opening to comment on the merits of how the Fish and Wildlife Service (FWS) weighed the costs and benefits of a critical habitat designation. Petitioner and their amici specifically encourage this Court not to take into account important ancillary and unquantified benefits. Consequently, Policy Integrity has a significant interest in this Court's framing and resolution of the second question presented.

SUMMARY OF THE ARGUMENT

After qualitatively assessing both the direct conservation benefits to the dusky gopher frog and the ancillary benefits to property values, coexisting species, ecosystem services including water quality, aesthetic values, and recreational opportunities, the Fish and Wildlife Service (FWS) decided not to exclude certain land (Unit 1) from the critical habitat designation. J.A. 95–98, 189–90.

Petitioner and its supporters seek to overstep the bounds of the second question presented on the reviewability of decisions not to exclude areas from critical habitat designations, and they tack on the additional request that this Court comment on the merits of FWS's decision not to exclude Unit 1 from designation as critical habitat. *E.g.*, Pet'r Br. 56 ("This Court may itself decide that FWS's determination was an abuse of discretion."); Wash. Legal Found. & Allied Educ. Found. *Amici* Br. 30. ("Given the factual record, the Court may wish to consider declaring that FWS abused its discretion."); *see also* Alabama et al. *Amici* Br. 3.

Embedded in their request for the Court's comment is the flawed assumption that neither ancillary benefits nor unquantified benefits deserve any weight when comparing the costs and benefits of critical habitat designations. *E.g.*, Markle Interests et al. Br. 15 ("The Service's economic analysis found only ancillary benefits."); *id.* 50 ("[T]he conservation benefit to the frog amounts to nil."); Wash. Legal Found. Br. 33 ("[T]he study confined its discussion to consideration of 'ancillary benefits'. . . . [T]he relevant

'benefits' of FWS's designation are precisely zero."). Those attempts to belittle and ignore ancillary and unquantified benefits contravene the plain text of the Endangered Species Act and violate both guiding principles and longstanding agency practices for rational, balanced economic analysis.

The 1978 amendments to the Endangered Species Act authorized the agency to consider a broad scope of "benefits," consistent with Executive Orders and guidance from the Office of Management and Budget on regulatory impact analysis. For at least twenty-five years, under administrations of both political parties, FWS has consistently assessed the ancillary and unquantified benefits of critical habitat designations. Courts have repeatedly required agencies to account for the indirect and unquantified consequences of regulation, and courts unmistakably allow the consideration of ancillary and unquantified benefits when not expressly precluded by statute.

Should this Court reach the merits of how FWS weighed the costs and benefits of its critical habitat designation, the Court should recognize that it is appropriate for agencies to fully consider ancillary and unquantified benefits—indeed, had FWS failed to consider important ancillary or unquantified benefits of its critical habitat designation, that omission would have been arbitrary.

ARGUMENT

I. FWS Considered Ancillary and Unquantified Benefits in the Critical Habitat Designation

The Endangered Species Act requires the agency to "tak[e] into consideration the economic impact . . .

and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The statute then gives the agency discretion to exclude certain areas from designation if "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.*

Following those statutory instructions, FWS considered both the direct and ancillary benefits of designating critical habitat for the dusky gopher frog (as well as the direct and indirect costs). In the *Federal Register* publication of the rule designating critical habitat for the frog, FWS explains that the "direct benefits . . . are best expressed in biological terms" that are difficult to "quantify or monetize." J.A. 189. FWS also more broadly referred to the "qualitative discussion" of all of the designation's "economic benefits" contained in the *Final Economic Analysis*. *Id.*; *see also* J.A. 190 (further concluding that "Our economic analysis did not identify any disproportionate costs" as compared to the total economic benefits of the designation).

The *Final Economic Analysis* explains that—under the best practices for assessing costs and benefits provided by Executive Order 12,866 and the Office of Management and Budget (OMB)'s *Circular A-4*—federal agencies consider both direct and ancillary benefits. Indus. Econ. Inc., *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog: Final* at 2-18 (2012) (prepared for FWS)

[hereinafter *FEA*].[3] The direct benefit of the critical habitat designation is "the potential to enhance conservation" of the dusky gopher frog, *id.*, and a valuation of the direct benefit would reflect "public willingness to pay for wildlife-viewing opportunities" and "to assure that the species will exist for future generations," as well as the frog's existence value, *id.* at 5-1. Unfortunately, the data necessary to quantify or monetize the direct benefits did not exist. *Id.*

The *Final Economic Analysis* then lists numerous ancillary benefits. While these ancillary benefits were not the primary motivation for the critical habitat designation, they are nevertheless important and exist independently of any conservation benefits accruing specifically to the dusky gopher frog. The ancillary benefits of the critical habitat designation arise through two pathways. First, the critical habitat designation protects certain environmental conditions and features, called "Primary Constituent Elements." *Id.* at 2-18. For example, the critical habitat designated as Unit 1 was selected to protect its "ephemeral wetland habitat." J.A. 153, 160–161, 167 (meaning isolated ponds, free of chemicals and sediment, with surface water lasting at least 195 days during breeding season). Maintaining those ephemeral wetlands "may generate other social benefits aside from the preservation of the [dusky gopher frog] species." *FEA*, *supra*, at 2-18. Second, the designation and subsequent conservation efforts may

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[3] Some pages of the *Final Economic Analysis* are omitted from the Joint Appendix. The full report is available at https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157.

preserve certain portions of undeveloped land in Unit 1. *Id.* at 5-2. The resulting open space preserved from development may generate ancillary benefits.

Overall, the important categories of potential ancillary benefits from the designation of critical habitat for the dusky gopher frog include:

- Property value benefits for adjacent or nearby landowners from increased open space or decreased density of development;
- Benefits to other coexisting species from the preservation of ephemeral wetlands and open spaces, including use and non-use values for those species;
- Improvements to ecosystem health, biodiversity gains, and ecosystem service benefits, including potential improvements in water quality;
- Aesthetic benefits and public willingness to pay to preserve wetland habitats or open spaces;
- Increased recreational opportunities throughout the region;
- Possible gains to regional employment, output, or income stemming from the above benefits; and
- Benefits to state and local governments, because identification of these critical habitats and the features they contain will assist local governments with long-range planning.

Id. at 2-18, 5-1 to 5-3; 77 Fed. Reg. 35,118, 35,144 (June 12, 2012).[4]

Petitioner and its supporters wrongly portray all these ancillary benefits as worthless.

II. Ancillary Benefits Must Be Given Due Consideration Under the Endangered Species Act, Executive Orders, and Best Practices for Cost-Benefit Analysis

A. Petitioner and Its Supporters Wrongly Disparage Ancillary Benefits

In attacking how FWS weighed the benefits of including Unit 1 in the critical habitat designation, Petitioner ignores the designation's many ancillary benefits. First, Petitioner accuses FWS of "invo[king]" the direct "'biological' benefits" of "the designation *as a whole*" to justify specifying Unit 1 as critical habitat, rather than focusing on "area-specific" benefits particular to Unit 1. Pet'r Br. 53. In fact, *all* the ancillary benefits listed in the *Final Economic Analysis* "are only anticipated related to the avoidance of development in Unit 1." *FEA*, *supra*, at 5-2.[5] Because FWS considered both direct and

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[4] Several pages from the *Federal Register* publication of the critical habitat designation, including sections on compliance with requirements for various regulatory analyses, are omitted from the Joint Appendix.

[5] The other units designated as critical habitat mostly either are already "managed to benefit the gopher frog," already have development plans that "include leaving proposed critical habitat areas as wetlands/open space," or are areas where "large-scale development . . . appears unlikely." *FEA*, *supra*, at ES-7, 2-14, 3-1 to 3-3, 4-11. Therefore, the "incremental[ ]" and "additional" conservation efforts "anticipated . . . as a result of

ancillary benefits in deciding not to exclude Unit 1, and because all the potential ancillary benefits will accrue from Unit 1's designation, FWS made an area-specific determination for Unit 1's inclusion. Petitioner's argument ignores the existence of the ancillary benefits from Unit 1.

Second, Petitioner argues that the *Final Economic Analysis* offers a "deficient" explanation of how FWS weighed costs and benefits, and Petitioner mischaracterizes the economic analysis as "briefly discuss[ing] a handful of 'weak[ ] and speculative' economic benefits (on which FWS did not rely)." Pet'r Br. 54 n.15. In fact, the *Final Economic Analysis*'s Chapter 5 on "Potential Economic Benefits" lists four categories of direct use and non-use values; explains the data challenges that prevented quantifying or monetizing those direct benefits; and qualitatively describes multiple important ancillary benefits, including property value benefits, aesthetic benefits, recreation benefits, ecosystem service benefits such as water quality, biodiversity and habitat maintenance benefits, and use and non-use values for preserving co-existing species. *FEA*, *supra*, at 5-1 to 5-3; *see also id.* at 2-18. In the *Federal Register* publication of the rule, when FWS discusses its qualitative consideration of "economic benefits," J.A. 189, it is referring to the entire suite of both direct and ancillary benefits examined in Chapter 5 of the economic analysis, and the agency explicitly relies on all those benefits in concluding that the costs of designation were not "disproportionate." J.A. 190 (the

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critical habitat designation" will occur in Unit 1, and so Unit 1's designation generates the ancillary benefits. *Id.* at 5-2.

paragraph concluding that costs were not disproportionate immediately follows the paragraph referencing the FEA's discussion of economic benefits). Again, Petitioner's argument ignores the relevance of ancillary benefits.

Third, Petitioner argues that all possible benefits are "speculative" because no "biological benefit" can occur in Unit 1 without both voluntary translocation of the dusky gopher frog and voluntary management of the site as frog habitat, and Unit 1's landowners allegedly have not agreed to undertake such actions. Pet'r Br. 54–55. Yet again, Petitioner is ignoring the important categories of ancillary benefits, many of which can occur independently of frog translocation or management of the site as frog habitat. Regardless of frog translocation or habitat management, the preservation of ephemeral wetlands and open spaces in Unit 1 may raise adjacent property values, benefit other coexisting species, improve ecosystem services like water quality, preserve aesthetic benefits, and increase recreational opportunities throughout the region. J.A. 97–98. Additionally, the designation itself produces useful environmental information that may assist local governments with their long-term planning. 77 Fed. Reg. at 35,144.

Landowner Respondents even more explicitly disparage ancillary benefits as inferior: when their brief incorrectly alleges that "[t]he Service's economic analysis found only ancillary benefits," Markle Br. 15, the word "only" reads as an attempt to trivialize. Landowner Respondents then conspicuously omit any reference to ancillary benefits when dismissing "the

conservation benefit to the frog" as "amount[ing] to nil." *Id.* at 50.

Amici Washington Legal Foundation also attempt to trivialize ancillary benefits. After wrongly concluding that the *Final Economic Analysis* "could not identify *any* 'direct benefits,'" Wash. Legal Found. Br. 32—in fact, the analysis identified several direct use and non-use values, though it could not quantify them, *FEA*, *supra*, at 5-1—the amici mischaracterize the economic analysis as "confin[ing] its discussion to consideration of 'ancillary benefits,'" Wash. Legal Found. Br. 33. Amici then dismiss all those ancillary benefits as unconnected to "the purpose of designating critical habitat designation: to ensure the survival of an endangered species." *Id.* Consequently, amici conclude that "the relevant 'benefits' of FWS's designation are precisely zero." *Id.* In other words, amici deem ancillary benefits to be worthless and irrelevant to the purpose of the Endangered Species Act. *See also* Alabama et al. *Amici* Br. 3 (failing to mention ancillary benefits in their critique of FWS's consideration of benefits); Am. Farm Bureau Fed'n et al. *Amici* Br. 35 (same).

Contrary to amici's argument, ancillary benefits are highly relevant to decision made under the Endangered Species Act, as explained in the next section of this brief. By ignoring important categories of ancillary benefits, Petitioner and its supporters contravene the plain text and congressional intent of the Endangered Species Act.

B. The Endangered Species Act Requires Consideration of All Benefits—Direct and Ancillary

Section 4(b)(2) of the Endangered Species Act—which grants discretion to exclude areas from critical habitat designations if "the benefits of such exclusion outweigh the benefits of specifying such area"—places no limiting qualifiers on the term "benefits." 16 U.S.C. § 1533(b)(2). Congress knew how to limit the consideration of benefits to only those benefits accruing specifically to the endangered species. For example, Congress instructs the agency not to designate any Department of Defense lands as critical habitat if those lands are already "subject to an integrated natural resources management plan" that the agency determines already adequately "provides a benefit *to the species* for which critical habitat is proposed for designation." 16 U.S.C. § 1533(a)(3)(B)(i) (emphasis added). By comparison, Section 4(b)(2)'s open-ended use of the word "benefits" indicates that all benefits count, whether direct benefits to a particular endangered species or ancillary benefits to other species, habitats, and interests. Indeed, the word harkens back to the congressional finding and declaration that introduces the Endangered Species Act: "the Nation's heritage in fish, wildlife, and plants" is "for the *benefit of all* citizens." 16 U.S.C. § 1531(a)(5) (emphasis added). Consequently, it was reasonable for FWS to interpret the undefined term "benefits" broadly to include all direct and ancillary benefits.

The legislative history from the 1978 statutory amendments that added Section 4(b)(2) confirms the

broad scope of the word "benefits." The language for Section 4(b)(2) originated in a bill drafted by the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, chaired by Rep. Leggett. During the House's consideration and passage of the legislation, in the middle of discussing the "discretion" now given to the Secretary in weighing the costs and benefits of critical habitat designation, Rep. Leggett recalled that:

> The ultimate goal of the Endangered Species Act is the conservation of the ecosystem on which all species, whether endangered or not, depend for survival.

124 Cong. Rec. 38,134 (Oct. 14, 1978) (statement of Rep. Leggett), *reprinted in* S. Comm. on Env't & Pub. Works, 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979 and 1980*, at 825 (1982) [hereinafter Leg. Hist.]. In other words, the chair of the drafting committee believed that ancillary benefits to non-endangered species, and to the ecosystems they share with endangered species, were relevant to critical habitat designations.

A related provision introduced in the 1978 amendments required an interagency Endangered Species Committee to exempt certain federal actions from consultations and restrictions if "the benefits of such action clearly outweigh the benefits of alternative courses of action." 16 U.S.C. § 1536(h)(1)(A)(ii). A Joint Explanatory Statement of the House-Senate Conference Committee on the 1978 amendments explained that the word "benefits" in

that related provision "shall include, but not be limited to, ecological and economic considerations," and that the interagency committee "should also consider the national interest . . . the esthetic, ecological, educational, historical, recreational and scientific value of any endangered or threatened species; and any other factors deemed relevant." H.R. Rep. No. 95-1804 (1978), *reprinted in* Leg. Hist., *supra*, at 1211.

In addition to that expansive and open-ended list, the Joint Explanatory Statement of the House-Senate Conference Committee also recommended that the interagency Endangered Species Committee should consult the criteria "in OMB Circular A-107 and in Executive Order 11,949" on the scope of costs and benefits to consider. *Id.* President Ford issued Executive Order 11,949 to broaden the title and scope of his prior Executive Order 11,821, from "inflation impact statements" to the broader "economic impact statements." 42 Fed. Reg. 1017 (Jan. 5, 1977). OMB's *Circular A-107*, issued in 1975 under Executive Order 11,821, guided agencies on their evaluation of regulatory impacts, and notably it both encouraged agencies to consider "secondary cost and price effects" and also recognized that not all important benefits could be quantified. Office of Mgmt. & Budget, Exec. Office of the President, *Circular A-107* § 4(b)(1)–(2) (1975) (advising that "benefits should be quantified to the extent practical" and so implicitly including unquantifiable effects in the "comparison of the benefits").[6] It is notable that, from the time of the 1978

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[6] *Available at* https://www.fordlibrarymuseum.gov/library/document/0039/18514794.pdf (see page 34 of the pdf).

amendments, Congress intended that the term "benefits" be understood by reference to the federal government's guiding documents on regulatory cost-benefit analysis, which advised agencies to consider indirect effects and unquantified benefits. Of course, those original documents referenced by Congress—*Circular A-107* and Executive Order 11,949—were the precursors to the federal government's current guiding documents on cost-benefit analysis: *Circular A-4* and Executive Orders 12,866 and 13,563.[7] As explained in the next section, those current guidelines continue to require federal agencies to fully consider both ancillary and unquantified benefits.

C. Executive Orders and Guidelines Require Federal Agencies to Consider Ancillary Benefits in Regulatory Impact Analyses

To accurately evaluate costs and benefits in regulatory impact analyses, executive orders require federal agencies to consider not only direct effects, but also all important indirect benefits (sometimes called ancillary benefits or co-benefits) as well as indirect costs (sometimes called countervailing risks). Executive Order 12,866 instructs agencies to "assess *all* costs and benefits," including "both quantifiable . . . and qualitative measures," where benefits include

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[7] Executive Order 12,866 remains the guiding order on regulatory cost-benefit analysis under the Trump administration, and recent executive orders have continued to cite elements of Executive Order 13,563 as well. *See* Exec. Order No. 13,777 § 2(a)(ii)-(iii), 82 Fed. Reg. 12,285, 12,285 (Mar. 1, 2017). Regardless, Executive Orders 12,866 and 13,563 were the operative orders in 2012, when FWS finalized its critical habitat designation rule for the dusky gopher frog.

any "other advantages" relevant to the determination and consistent with statutory requirements. Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993) (emphasis added). Executive Order 13,563 affirms those instructions and elaborates that agencies must accurately measure the "actual results of regulatory requirements." Exec. Order No. 13,563 § 1, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011). The orders make no distinction between the treatment of direct and indirect effects.

The Office of Management and Budget under President George W. Bush issued *Circular A-4*, to "standardiz[e] the way benefits and costs of Federal regulatory actions are measured." Office of Mgmt. & Budget, Exec. Office of the President, *Circular A-4* at 1 (2003) [hereinafter *Circular A-4*]. The *Circular* instructs agencies to consider "any important ancillary benefits" (defined as any "favorable impact . . . secondary to the statutory purpose of the rulemaking"), and stresses that "[t]he same standards of information and analysis quality that apply to direct benefits and costs should be applied to ancillary benefits and countervailing risks." *Id.* at 26.

The Environmental Protection Agency (EPA) has also developed its own *Guidelines for Preparing Economic Analyses*, to "establish a sound scientific framework for performing economic analyses of environmental regulations and policies." Envtl. Prot. Agency, *What Are the* Guidelines?, https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses (last visited July 1, 2018). These guidelines, which were substantially updated in 2010 after extensive peer

review, stress the importance of assessing "all identifiable costs and benefits," including both direct effects "as well as ancillary [indirect] benefits and costs." Envtl. Prot. Agency, *Guidelines for Preparing Economic Analyses* 11-2 (2010).[8] Though not binding on other agencies, EPA's *Guidelines* reflect deep and careful thinking about environmental economics and provide a useful synthesis of best analytical practices that other agencies can follow. *See FEA*, *supra*, at 2-4 n.33 (citing the *Guidelines*).

Indeed, EPA has a long history of considering ancillary benefits in regulatory decisions made under administrations of both political parties. For example, under President Ford in 1975, EPA considered the "indirect benefits from induced mass transit improvements" in proposing a new transportation control plan for metropolitan Boston to regulate automobile emissions. 40 Fed. Reg. 8668, 8673 (Feb. 28, 1975). Under President Carter, EPA's cost-benefit analysis of warning labels for hazardous chemicals considered the "indirect benefits of the labeling regulation," including the "incentives for the development of safer substitutes." 46 Fed. Reg. 3471, 3472 (Jan. 14, 1981). And under President Reagan, EPA explained that it intended to "consider the full spectrum of the potential impacts of regulation," including "indirect benefits accruing from concomitant reductions in other regulated pollutants." 52 Fed. Reg. 25,399, 25,406 (July 7, 1987).

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[8] *Available at* https://www.epa.gov/sites/production/files/2017-09/documents/ee-0568-11.pdf.

As discussed in the next section, agencies have long considered the ancillary benefits of critical habitat designations, stretching from at least 1992 through to the current presidential administration.

D. For Over Twenty-Five Years, Under Administrations of Both Parties, FWS Has Consistently Assessed the Ancillary Benefits of Critical Habitat Designations

FWS has a long history, under administrations of both political parties, of assessing ancillary benefits in its critical habitat designations. For example, in 1992 during the George H.W. Bush administration, FWS issued its Determination of Critical Habitat for the Northern Spotted Owl. In that designation, FWS wrote:

> Designation of critical habitat for the spotted owl is expected to provide a wide range of economic benefits to society. These economic benefits are whenever possible defined in monetary terms. They include use values as well as intrinsic or preservation values. Benefits provided by preservation of the owl's habitat include the same types of direct *and indirect use values* of old growth forest ecosystems. Habitat preservation also provides *water quality protection, scenic and air quality, biological diversity, and other environmental services.*
>
> Benefits of critical habitat designation are in addition to those

> provided by listing of the owl as threatened or those derived from other actions taken by land management agencies to provide protection to the owl and its habitat. Only the incremental protection provided by critical habitat designation, *and the ancillary benefits* attributable to that action, are compared with the incremental costs of restricting timber harvest and other economic effects of designating critical habitat.

57 Fed. Reg. 1796, 1819 (Jan. 15, 1992) (emphases added).

Throughout the administrations of Presidents Bill Clinton and George W. Bush, FWS's economic analyses routinely discussed ancillary benefits. For example, in the 2006 analysis of the critical habitat designation for the mountain yellow-legged frog, FWS listed such "ancillary benefits" as adjacent property value increases, "increased water quality resulting from fewer recreators impacting streams (e.g., reduced siltation), improved biological information resulting from surveys of frog habitat, and reduced threat of catastrophic fire related to increased fire suppression activities." Indus. Econ. Inc., *Economic Analysis of Critical Habitat Designation for the Mountain Yellow-Legged Frog* 9 (2006) (prepared for FWS);[9] *see also, e.g.*, Indus. Econ. Inc., *Economic Analysis of Critical Habitat Designation for the*

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[9] *Available at* https://www.fws.gov/economics/Critical%20Habitat/Final%20Reports/Mountain%20yellow-legged%20frog/MYLF_FEA1_2006.08.14.pdf.

Guajón 9–10 (2007) (prepared for FWS) ("For example, conservation of guajón habitat may reduce erosion in stream watersheds, improving water quality in downstream reservoirs.");[10] Indus. Econ. Inc., *Economic Analysis of Critical Habitat Designation for the Alameda Whipsnake* 18 (2000) (prepared for FWS) (listing such benefits as biodiversity, ecosystem health, and wildlife viewing).[11]

More recently, in its August 2017 designation of critical habitat for certain populations of endangered and threatened Atlantic sturgeon, the National Marine Fisheries Service—FWS's partner agency in administering the Endangered Species Act—wrote:

> Other benefits of designation include ancillary benefits to other commercially-important aquatic species associated with Atlantic sturgeon habitat; non-use values for sturgeon and their habitats; and increased state, local and public awareness of the importance of these areas, that could generate non-federal conservation efforts and benefits.

82 Fed. Reg. 39,160, 39,234 (Aug. 17, 2017). Though in that rulemaking the National Marine Fisheries Service ultimately excluded certain areas from

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[10] *Available at* https://www.fws.gov/economics/Critical%20Habitat/Final%20Draft%20Reports/Guajon/Guajon_FinalDEA_5.29.07.pdf.

[11] *Available at* https://www.fws.gov/economics/Critical%20Habitat/ESA%20Reports%20as%20of%20August%202005/Alameda%20whipsnake/Final%20Report/SNAKEFN4.DOC.

habitat designation, it did so only after considering all the important ancillary benefits. *Id.*

FWS's reliance on ancillary benefits in its critical habitat designation for the dusky gopher frog is consistent with this twenty-five-year-long practice under the Endangered Species Act. Moreover, its consideration of ancillary benefits is consistent with the agency's consideration of indirect costs, as explained in the next section.

E. It Would Be Arbitrary to Treat Ancillary Benefits Differently Than Indirect Costs

Even as they dismiss ancillary benefits as worthless, Petitioner and its supporters criticize FWS's alleged failure to consider all indirect costs, such as lost tax revenue to the local government and secondary hazards arising from any controlled burns set to manage the frog habitat. Pet'r Br. 54; Wash. Legal Found. Br. 31.[12] There are two fatal problems with this argument.

First, the agency already accounted for indirect effects like taxes and fires. FWS's economic analysis detailed both the direct and indirect costs of the

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[12] Lost tax revenue, assuming it existed, would not properly be characterized as a "cost"; rather, it would be a distributional effect, since taxes are transfer payments from private parties to the government. *See Circular A-4*, *supra*, at 14 ("[T]he revenue collected through a . . . tax is a transfer payment."). Potential environmental or health hazards resulting from controlled burns, assuming they existed, would clearly be indirect costs, as they are highly analogous to the prototypical example of countervailing risks offered by OMB's *Circular A-4*: namely, "adverse safety impacts from more stringent fuel-economy standards," *see id.* at 26.

critical habitat designation. The agency explained that costs were uncertain and so considered a range of scenarios, under which the monetized direct costs for Unit 1's designation could be as little as $0, or as much as $34 million. *FEA*, *supra*, at ES-9. Then FWS also qualitatively considered a variety of indirect costs, including costs from regulatory uncertainty, stigma costs to property values, and lost oil and gas production. *Id.* at 2-17, 4-8. Finally, the agency considered, but ultimately dismissed as unlikely, both possible indirect lost tax revenue for the local government, 77 Fed. Reg. at 35,127, and possible indirect health or environmental effects from the controlled burns necessary to manage habitat for the dusky gopher frog, *id.* at 35,126.

Second, there is no reason for agencies to treat indirect benefits differently than indirect costs. Indeed, it is hard to imagine anything more arbitrary or capricious than taking indirect consequences of regulation into account if they are negative while ignoring them if they are positive.

Indirect benefits "are simply mirror images" of indirect costs. Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. Chi. L. Rev. 1763, 1793 (2002). The terms "benefit" and "cost" are merely convenient labels for positive effects versus negative effects and do not reflect any distinction warranting different analytical treatment. For example, EPA's original analysis of its greenhouse gas standards for passenger cars counted consumers' fuel savings "as negative costs (i.e., positive benefits)." Envtl. Prot. Agency, *Draft*

Regulatory Impact Analysis: Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards at xiii (2009). Furthermore, agencies are required to treat costs and benefits alike and consider each with comparable analysis, and may not "put a thumb on the scale by undervaluing the benefits and overvaluing the costs." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008); *see also Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (chastising the agency for "inconsistently and opportunistically fram[ing] the costs and benefits of the rule"); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding that if an agency "trumpet[s]" economic benefits, it must also disclose costs); *Mont. Envtl. Info. Ctr. v. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017) (finding it "arbitrary and capricious" to "quantify socioeconomic benefits while failing to quantify costs").

According to two former administrators of the Office of Information and Regulatory Affairs, the office charged with reviewing agencies' cost-benefit analyses, there are "no legal, political, or intellectual . . . impediments to treating ancillary benefits and countervailing risks equally in cost-benefit analysis." Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 Mich. L. Rev. 877, 888 (2010). Given the lack of a logical distinction between indirect costs and indirect benefits, Petitioner and its supporters cannot reasonably contend that FWS must consider those indirect costs that support their arguments, while also insisting that indirect benefits

are irrelevant and worthless. Such an illogical distinction would be arbitrary and capricious, and would violate legal precedents on the consideration of indirect regulatory effects, as described further in the next section of this brief.

F. Courts Require Agencies to Account for the Indirect Consequences of Regulation

At a minimum, consideration of ancillary benefits is permissible when not expressly precluded by statute. *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 625–26 (D.C. Cir. 2016) (explaining that the statutory "text does not foreclose the Agency from considering co-benefits and doing so is consistent with the [statute's] purpose"). Since the Endangered Species Act does not expressly preclude the consideration of ancillary benefits—to the contrary, the plain text, legislative history, and statutory purpose require it, *see supra* Section II.B.—FWS had discretion to weigh ancillary benefits against economic costs in deciding whether to exclude areas from critical habitat designations.

Moreover, when agencies choose or are required to justify rules by a cost-benefit analysis, courts have repeatedly instructed agencies to consider indirect effects. In the recent case *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015), this Court explained that the advantages and disadvantages of regulation included not just direct compliance costs, but indirect "harms that regulation might do to human health or the environment." Numerous rulings from several U.S. Courts of Appeals similarly require agencies to account for the indirect effects of regulation when

weighing costs and benefits. *See Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1051–52 (D.C. Cir. 1999) (holding that EPA must consider the indirect health costs of reducing a pollutant rather than only "half of a substance's health effects"), *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 956 F.2d 321, 326–27 (D.C. Cir. 1992) (striking down a rule for failing to consider indirect safety effects); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1224–1225 (5th Cir. 1991) (holding that EPA must consider the indirect safety effects of substitute options for car brakes when banning asbestos-based brakes under the Toxic Substances Control Act); *see also Am. Dental Ass'n v. Martin*, 984 F.2d 823, 826 (7th Cir. 1993) (criticizing the Occupational Safety and Health Administration because its "consideration of the indirect costs of the rule is thus incomplete").

Although those precedents focus on the consideration of indirect costs rather than indirect benefits, as explained above, there is no logical reason for agencies to treat indirect benefits differently than indirect costs.

III. Unquantified Benefits Also Must Be Given Due Consideration Under Executive Orders and Best Practices for Cost-Benefit Analysis

Neither the ancillary nor the direct benefits of the critical habitat designation for the dusky gopher frog should be ignored simply because they cannot currently be fully quantified or monetized.

To the contrary, the executive orders governing regulatory analysis instruct agencies to give due consideration to all important unquantified costs and benefits. Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. at 51,735 ("Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."); *see also* Exec. Order No. 13,563 § 1, 76 Fed. Reg. at 3821. OMB's *Circular A-4* cautions agencies against ignoring the potential magnitude of unquantified benefits, because the most efficient rule may not have the "largest quantified and monetized . . . estimate." *Circular A-4, supra*, at 2. Indeed, it is widely recognized in the economic literature that cost-benefit analysis requires proper consideration of effects that "defy quantification but are thought to be important." Kenneth J. Arrow et al., *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles* 8 (1996).[13] The mere fact that a benefit cannot currently be quantified says little about its magnitude. In fact, some of the most substantial categories of monetized benefits that appear in current regulatory impact analyses were once considered unquantifiable. *See* Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 Cal. L. Rev. 1423, 1436 (2014) (explaining, for example, how the key valuation of mortality risk

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[13] *Available at* http://www.aei.org/wp-content/uploads/2014/04/-benefitcost-analysis-in-environmental-health-and-safety-regulation_161535983778.pdf.

reductions—also known as the "value of statistical life"—had "initially evaded quantification").

Proper consideration of unquantified benefits has long been part of best agency practice. Recall how in 1978, Congress referred the interagency Endangered Species Committee to OMB's *Circular A-107*, which advised agencies that "benefits should be quantified to the extent practical" but implicitly recognized that some important benefits could not be quantified. *See supra* Section II.B. FWS has a long history, stretching back over twenty-five years and through administrations of both political parties, of following that advice and weighing unquantified benefits in its critical habitat designations. For example, in 1992, FWS explained that "economic benefits are whenever possible defined in monetary terms" but proceeded to discuss numerous benefits in qualitative terms, including biodiversity and ecosystem services. 57 Fed. Reg. at 1819; *see also, e.g.*, Indus. Econ. Inc., *Economic Analysis of Critical Habitat Designation for the Mountain Yellow-Legged Frog*, *supra*, at 9 (2006) ("Data required to quantify and monetize these benefits (e.g., incremental changes in water quality . . .) are not readily available.").

Agencies have long weighed unquantified environmental benefits in a variety of contexts. For example, in response to criticisms of its benzene regulations under the Clean Air Act, EPA under President George H.W. Bush "reject[ed] the position that only quantified information can be considered in the decisions." 55 Fed. Reg. 8292, 8302 (Mar. 7, 1990). Similarly, in EPA's *Guidelines on Preparing Economic Analyses*, the agency writes: "In reality . . . there are

often effects that cannot be monetized, and the analysis needs to communicate the full richness of benefit and cost information beyond what can be put in dollar terms. . . . Benefits and costs that cannot be quantified should be presented qualitatively." *Guidelines*, *supra*, at 11-2.

Courts agree that agencies have an obligation to consider reasonably foreseeable but difficult to quantify regulatory effects. *See, e.g.*, *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) ("The mere fact that the magnitude of [an effect] is uncertain is no justification for disregarding the effect entirely."); *Am Trucking Ass'ns v. EPA*, 175 F.3d at 1052 (rejecting the idea that EPA could ignore health effects that are "difficult, if not impossible, to quantify reliably").

The fact that the data necessary to quantify and monetize the direct and ancillary benefits of the critical habitat designation did not exist in no way diminishes the relevance of these benefits to FWS's decision. Agencies are expected to weigh unquantified effects against monetized costs and benefits in accordance with their judgment and expertise. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 235 (2009) (Breyer, J., concurring in part and dissenting in part) (writing approvingly of EPA's ability to "describe environmental benefits in non-monetized terms and to evaluate both costs and benefits in accordance with its expert judgment and scientific knowledge"). That is precisely what FWS did here.

CONCLUSION

Should this Court enlarge the scope of the second question presented as Petitioner and its supporters seek and so reach the merits of how FWS weighed the costs and benefits of its critical habitat designation, the Court should recognize that it is appropriate for agencies to fully consider ancillary and unquantified benefits.

Respectfully submitted,

Richard L. Revesz *
Jason A. Schwartz
INSTITUTE FOR POLICY INTEGRITY
NEW YORK UNIVERSITY SCHOOL OF LAW
139 MacDougal St., 3rd Floor
New York, NY 10012
Tel: (212) 998-6185
richard.revesz@nyu.edu
**Counsel of Record*